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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida,

Petitioner,

vs.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and

THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents.

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II, Executive Assistant Attorney General

RICHARD L. CHAMBERS
Assistant Attorney General

JOHN W. DUNSMORE, JR., Deputy Assistant Attorney General

Please Address all communications to:
JOHN W. DUNSMORE, JR.
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
Phone: 404-656-2976

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BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE

OPINIONS BELOW

The original opinion of the United States District Court for the Southern District of Florida is reported at 332 F.Supp. 1107 (S.D. Fla. 1971). The Order adopting a plan to implement the original opinion is reported

at 336 F.Supp. 490 (S.D. Fla. 1972). The District Court findings, requested by the Court of Appeals after oral argument are reported at 355 F.Supp. 1286 (S.D. Fla. 1973). The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 483 F.2d 778 (5th Cir. 1973).

PRELIMINARY STATEMENT

Comes now the State of Georgia, by and through its Attorney General, by invitation of this Court, and files its brief *Amicus Curiae* in the above-styled cause on behalf of Petitioner.

Amicus adopts *in toto* the position taken by Petitioner in the brief heretofore filed in this Court, and in addition thereto submits that the cause should be reversed for the reasons stated hereinafter.

QUESTION PRESENTED

Is there a constitutional requirement that shortly after a state has arrested an individual that he be taken before a detached magistrate for a determination of whether there is probable cause to hold that person for trial?

ARGUMENT

The United States Court of Appeals as well as the District Court, held that the Fourth and Fourteenth Amendments affirmatively require that arrestees held for trial upon information filed by the Florida State Attorney must be provided with a preliminary hearing before a judicial officer without unnecessary delay. These courts in effect declared Rule 3.131(a), Florida

Rules of Criminal Procedure,[1] unconstitutional, inasmuch as said Rule dispenses with preliminary hearings as to a defendant charged by an information or indictment.

Presented to this Court for consideration on a first impression basis is the issue of whether or not the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment requires a state to assume the burden of providing some sort of pretrial custodial determination before a detached individual within the meaning of *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) and *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), after an individual has been incarcerated in order to determine whether or not there is probable cause to continue detaining that individual for trial. This issue brings into full circle a discussion of all of the possibilities under which one may or may not be entitled to a preliminary hearing.

It is well settled that the denial of a preliminary hearing after one has been indicted is not a denial of due process, inasmuch as the indictment has taken the place of a preliminary hearing and has furnished a basis for finding probable cause to detain an individual for trial.[2] *Jaben v. United States*, 381 U.S. 214 (1965); *United States v. Myers*, 303 F.Supp. 1583 (D.D.C. 1969); *United States v. Farries*, 459 F.2d 1057 (3rd Cir. 1972), *cert. denied*, 409 U.S. 888, 410 U.S. 912 (1973). Further, it has been consistently held that the purpose of a preliminary hearing is not designed to be a discovery tool but to determine whether or not prob-

[1] Amicus will cite whenever appropriate, those corollary Georgia statutory provisions similar to the ones available to a criminally accused in Florida.

[2] *United States v. Eley*, 335 F.Supp. 353 (N.D. Ga. 1972).

able cause exists.[3] *United States v. Habig*, 474 F.2d 55 (10th Cir. 1973), *cert. denied*, 412 U.S. 941 (1973). *United States v. Conway*, 415 F.2d 158 (3rd Cir. 1969), *cert. denied*, 397 U.S. 994 (1970). It has also been held that the denial of a preliminary hearing does not deny one his right to confrontation. *Goldsby v. United States*, 160 U.S. 80 (1895). In addition, the constitution does not require a preliminary hearing before removal of an accused person for trial to a federal court having jurisdiction of the charge. *United States Ex Rel. Hughes v. Gault, Marshal*, 271 U.S. 142 (1926). However, in *Coleman v. Alabama*, 399 U.S. 1 (1970) this Court found that a preliminary hearing in Alabama was a key stage in their criminal prosecution, and as such an accused was entitled to be represented by counsel at such a hearing.

Also, there is no constitutional right to a preliminary hearing prior to indictment or prior to trial. *Goldsby v. United States*, 160 U.S. 80 (1895). This Court has also stated that there is no constitutional requirement that the state must provide a judicial determination as to probable cause to arrest prior to arresting one on information. *Lem Woom v. Oregon*, 234 U.S. 91 (1914); *Beck v. Washington*, 369 U.S. 541 (1962). Neither is it constitutionally impermissible to try an individual on information without seeking an indictment. *Hurtado v. California*, 110 U.S. 516 (1884).

What is being asked of this Court is that they declare that subsequent to an arrest and incarceration a state must as a constitutional prerequisite assume a burden of establishing probable cause to hold an individual for

[3] *Jackson v. State*, 225 Ga. 39 (1969); *cert. den.*, 399 U.S. 934 (1970).

trial on either an information or otherwise prior to indictment. One can also assume from Respondent's position that even if the constitution required that such a preliminary hearing would be available on request by an arrestee that this would not satisfy Respondent's constitutional contentions. Further, it would seem that Respondent takes the position that even in cases upon which one has been arrested pursuant to a warrant, the issuance of that warrant before an impartial magistrate does not satisfy the requisite of a probable cause determination.

To categorically state that under the due process clause of the Fourteenth Amendment a state must immediately conduct upon arrest and incarceration of an individual a probable cause hearing amounts to judicially amending the Constitution. Clearly, the lack of such a procedure is not violative of due process inasmuch as the United States Constitution provides a number of other remedies available to an accused designed to prevent any prolonged or oppressive periods of pretrial confinement. First of all, there is the right of an accused under the Sixth Amendment to a speedy trial. Second, an accused may test the pretrial restraint on his liberty by bringing a writ of habeas corpus as set forth in Art. I, § 9, United States Constitution. Third, the right of an accused to obtain pretrial liberty is protected by the Seventh Amendment which prohibits the use of excessive bail. These constitutional procedural safeguards which are available to an accused do not require a further due process requirement of the preliminary hearing where an accused is charged by an information.

In addition to the basic constitutional rights, the State of Florida has also instituted a number of statu-

tory procedural safeguards to prevent there being any protracted delays in getting an individual to trial. These provisions are as follows: Florida's mandatory speedy trial rule, Rule 3.191, Florida Rules of Criminal Procedure;[4] Florida's first appearance hearing within 24 hours of arrest, Rule 3.130(b) (1), Florida Rules of Criminal Procedure;[5] the right to bail under Rule 3.130(b) (4), Florida Rules of Criminal Procedure;[6] and further, Florida has provided an accused with comprehensive rules of pretrial discovery. (cit. omitted). The State of Georgia by statute and constitutional enactment has also instituted certain procedural safeguards as mentioned in the previous footnotes. In addition to those mentioned is the right of an individual to file a writ of habeas corpus.[7]

The language of this Court in *Coleman v. Alabama*, 399 U.S. 1 (1970), seems to further buttress Petitioner's position that a preliminary hearing is not constitutionally required of a State. In *Coleman*, *supra*, a preliminary hearing was not a required step in an Alabama prosecution, as a prosecutor could directly seek an indictment by grand jury without having a preliminary hearing. *Id.* 8. Further, Justice White in his concurring opinion lends additional credence to Petitioner's position when he stated in *Coleman*, *supra*, "Our ruling may also invite eliminating a preliminary hearing system entirely." *Id.* at 8.

In passing, the Federal Rules of Criminal Procedure

[4] Corollary Georgia provision: Ga. Const. Art. I, Sec. 2-105; Ga. Code § 27-1901.

[5] A similar Georgia statute: Ga. Laws 1956, p. 796, 797; Ga. Code Ann. § 27-210.

[6] Ga. Const. Art. I, Sec. 2-109; Ga. Code Ann. § 27-901.

[7] Ga. Const. Art. I, Sec. 2-111; Ga. Code Ann. § 50-101.

regarding preliminary hearings needs to be commented upon briefly. Rule 5, Subsection (c) of the Federal Rules of Criminal Procedure does not require that a preliminary hearing be held when information is filed against the defendant in a district court under Rule 7(a), Federal Rules of Criminal Procedure. Further, Title 18, U.S.C. § 3060(e) provides as follows:

> "No preliminary examination in compliance with subsection (a) of this section shall be required to be accorded an arrested person, nor shall such arrested person be discharged from custody or from the requirement of bail or any other condition or release pursuant to subsection (d), if at any time subsequent to the initial appearance of such person before judge or magistrate and prior to the date fixed for the preliminary examination pursuant to subsections (b) and (c) and indictment is returned or, in appropriate cases, and information is filed against such person in accord of the United States." [8]

Rule 7, subsection (a) of the Federal Rules of Criminal Procedure, provides for use of either information or indictment. A similar Georgia statute parallels this Federal Rule.[9]

There have been a number of federal circuits which have construed 18 U.S.C. § 3060 (b) and (c) to mean that the Constitution does not require preliminary hearings, and a subsequent conviction without a preliminary hearing will not be vitiated. *Sciortino v. Zampano*, 385 F.2d 132 (2nd Cir. 1967), *cert. denied*, 390 U.S. 906 (1968); *U.S. v. Farries*, 459 F.2d 1057 (3rd

[8] *United States v. Coley*, 441 F.2d 1299 (5th Cir. 1971), *cert. denied*, 404 U.S. 867 (1971).

[9] Ga. Code Ann. § 27-704; *Webb v. Hensley*, 209 Ga. 447, 74 S.E.2d 7 (1953); *Robertson v. Balkcom*, 212 Ga. 605, 94 S.E.2d 720 (1956).

Cir. 1972), *cert. denied*, 409 U.S. 888 (1972); *U.S. v. Anderson*, 481 F.2d 685 (4th Cir. 1973); *U.S. v. Rogers*, 455 F.2d 407 (5th Cir. 1972); *U.S. v. Coley*, 441 F.2d 1299 (5th Cir. 1971), *cert. denied*, 404 U.S. 867 (1971).[10] See also *U.S. v. Heideman*, 21 F.R.D. 335 (1958), aff'd 259 F.2d 943, *cert. denied*, 359 U.S. 959 (1959).

The United States Constitution as adopted did not contain any guarantee of indictment by grand jury, but the Fifth Amendment cured this hiatus. This provision, however, only applies to offenses against the United States and does not require a State to use an indictment for violations of state laws. *Rivera v. Government of Virgin Islands*, 375 F.2d 988 (3rd Cir. 1967).

In a Sixth Circuit decision arising out of Tennessee, the circuit court upheld a Tennessee statute which denied an accused a right to a preliminary hearing when a grand jury was in session, and further stated that such a provision was not unconstitutional as an accused has no right to a preliminary hearing before indictment. *Dillard v. Bomar*, 342 F.2d 789 (6th Cir. 1965). In a case arising out of the Virgin Islands, *Rivera v. Government of Virgin Islands*, 375 F.2d 988 (3rd Cir. 1967), a Virgin Island statute, 5 V.I.C. § 3581(a) does away with indictments and provides as follows, "every felony and every criminal action in the district court shall be prosecuted by information."

The Third Circuit decision stated that there was no constitutional right to a prosecution founded upon a grand jury indictment, and further found this territorial

[10] Georgia cases similarly holding that there is not constitutional right to a preliminary hearing are: *Johnson v. State*, 215 Ga. 839, 114 S.E.2d 35 (1960); *Shields v. State*, 126 Ga. App. 544, 191 S.E. 2d 448 (1972).

statutory provision to be constitutional. The court in *Rivera* also stated that the due process clause did apply to the Virgin Islands, and that this particular statute did not infringe upon due process. This circuit court stated that a preliminary hearing was not required, and further, that a preliminary hearing is a procedural right and not a right within the constitutional concept of due process; and as such can be cut off by the filing of either an indictment or information. See also, *Government of Virgin Islands v. Bolones*, 427 F.2d 1135 (3rd Cir. 1970).

Therefore, if a state can either bypass a preliminary hearing by going directly to an indictment, or as in *Hurtado v. California*, 110 U.S. 516 (1884) and *Lem Woom v. Oregon*, 234 U.S. 91 (1914), by proceeding directly by means of an information, there would seemingly be no constitutional mandate that would require a state to provide an accused with a preliminary hearing. While preliminary hearings are a good idea, they certainly are not constitutional requirements.

Respondents initially sought a judicial hearing to determine probable cause for their detention. When this was denied they took their complaint to the district court. *Pugh v. Rainwater*, 332 F.Supp. 1107 (S.D. Fla. 1971). Inasmuch as Respondents were dissatisfied with the Florida criminal procedure, the rule set down in *Younger v. Harris*, 404 U.S. 37 (1970), would seem to be applicable to this situation. Specifically, that the federal courts will not enjoin a pending state criminal prosecution except under certain extraordinary circumstances where there is the danger of irreparable loss and great harm. *Id.* at 43-45. In view of the procedural safeguards instituted by Florida in addition to those

set down in the United States Constitution, there would seemingly be no irreparable loss to Respondents. Respondents argue that principles of *Grannis v. Ordean*, 234 U.S. 385, 395 (1914), and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) are applicable, and that a denial of a preliminary hearing amounts to a denial of their right to be heard at a meaningful time. This contention would seem to lack any meaningful significance in view of *Goldsby v. U.S.*, 160 U.S. 70 (1895), which states that the denial of a preliminary hearing does not deny one his right to confrontation and cross-examination. Further, in view of the fact that Florida provides those who are arrested with the right to bail[11] and a right to a speedy trial[12], an accused in that state is afforded with more than the minimal due process requirements.

[11] Rule 3.130(b) (4), Florida Rules of Criminal Procedure.
[12] Rule 3.191, Florida Rules of Criminal Procedure.

CONCLUSION

For these reasons, Amicus respectfully urges this Court to reverse the holding of the Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

RICHARD L. CHAMBERS
Assistant Attorney General

JOHN W. DUNSMORE, JR.
Deputy Assistant
Attorney General

Please serve:

JOHN W. DUNSMORE, JR.
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-2976

CERTIFICATE OF SERVICE

I, Richard L. Chambers, one of the counsel for *Amicus Curiae*, and a member of the Bar of the Supreme Court of the United States hereby certify that on this _____ day of August, 1974, I served a copy of the Brief of *Amicus Curiae* on

LEONARD MELLON, ESQUIRE
Assistant Attorney General
2070 Main Street
Sarasota, Florida

counsel for the Petitioner and on

BRUCE ROGOW, ESQUIRE
733 City National Bank Building
25 West Flagler Street
Miami, Florida

counsel for Respondents, by duly addressed envelope with adequate postage prepaid.

_____
RICHARD L. CHAMBERS